ROSS MILLER Secretary of State

NICOLE J. LAMBOLEY Chief Deputy Secretary of State

CHRIS LEE
Deputy Secretary for
Southern Nevada

STATE OF NEVADA



OFFICE OF THE SECRETARY OF STATE

March 25, 2008

Secretary of State Interpretation Number: 08-23-01

Question: When verifying documents pertaining to a petition seeking the recall of public officer, is a county clerk required to verify whether the signatories to the petition actually voted in the election in which the officer was elected? Similarly, is a county clerk required to verify whether the address included with the signature on a petition matches the address in the file of applications to register to vote?

Analysis

First, with respect to verification of whether the petition signatories actually voted in the election in which the officer was elected, Article 2, Section 9 of the Nevada Constitution states, in relevant part, that "not less than twenty-five percent (25%) of the number who actually voted in the state or in the county, district, or municipality which he represents, at the election in which he was elected, shall file their petition...demanding his recall by the people." The plain and unambiguous language of this provision requires that a recall petition must be signed by at least 25% of the voters who actually voted at the election in which that public official was elected.

The Nevada Supreme Court has reviewed this provision in <u>Foley v. Kennedy</u>, 110 Nev. 1295, 885 P.2d 583 (1994). In <u>Foley</u>, the court addressed two issues, the first of which dealt with the proper election to be used in determining the number of signatures needed for a recall petition. In its ruling, the court stated:

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¹ This understanding of Article 2, Section 9 is consistent with the legislative record and the intent behind the amendment to the constitution. See <u>Minutes of the Senate Committee on Government Affairs</u>, July 1, 1993, at page 5.

According to the referenced constitutional provision, twentyfive percent of the persons who actually voted in the relevant political division in the preceding general election shall file their petition for recall. Thus, twenty-five percent of the persons who voted in the general election preceding the filing of the petition must sign the recall petition.²

110 Nev. at 1299.

Second, with respect to whether a county clerk is required to verify whether the address included with the signature on the petition matches the address in the file of applications to register to vote, NAC 293.185 states:

- If, while verifying signatures pursuant to NRS 293.1277, a county clerk discovers that an address included with a signature does not match the address for the registered voter who signed the petition as indicated in the file of applications to register to vote, the clerk shall notify the registered voter of the discrepancy.
- 2. A county clerk shall not verify any signature for a person who has been notified of a discrepancy pursuant to subsection 1 unless the person demonstrates to the satisfaction of the clerk that the person is a registered voter of the State, county district or municipality which is applicable for the ballot question or office that is the subject of the petition.

Additionally, NRS 293.1276 to 293.1279, inclusive, address the proper verification procedures regarding petitions to recall a public officer. See NRS 306.035. A plain reading of the statutes and recently adopted provisions of Nevada Administrative Code require that a county clerk verify that the signature on the petition corresponds to the address indicated in the file of applications to register to vote. If the address included with the signature on the petition does not match the address in the file of the application to register to vote, the clerk shall notify the registered voter of the discrepancy. It is the opinion position of this office that, in accordance with the adopted regulation, proper notice of a discrepancy pursuant to subsection 1 may

² Notably, the Foley court addressed the former Article 2, Section 9, which read "For this purpose, a number of registered voters not less than twenty five per cent (25%) of the number who actually voted in the state or in the county, district, or municipality electing said officer, at the preceding general election, shall file their petition...demanding his recall by the people..." (Italics added).

include, but is not limited to, written notice mailed to the addresses of the signatory, posting a list of names of deficient signatures on a public website, or placing a phone call to the signatory to notify the registered voter of the discrepancy. Any of the previously mentioned means of notification, or a combination thereof, would satisfy the regulatory notification requirement of NAC 293.185.

Conclusion

Accordingly, it is the understanding of this office that the plain language of the Nevada Constitution, Nevada Revised Statutes and Nevada Administrative Code must control. Therefore it is the duty of the county clerk to verify that:

- 1. The signatories of a recall petition actually voted in the election in which the officer subject to the petition was elected.
- 2. The address included with the signature on a petition matches the address in the file of applications to register to vote

Respectfully,

ROSS MILLER Secretary of State

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MINUTES OF MEETING ASSEMBLY COMMITTEE ON ELECTIONS AND PROCEDURES

Sixty-seventh Session June 17, 1993

The Assembly Committee on Elections and Procedures was called to order by Chairman Myrna T. Williams at 4:10 p.m., Thursday, June 17, 1993, in Room 331 of the Legislative Building, Carson City, Exhibit A is the Meeting Agenda, Exhibit B is the Nevada. Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Mrs. Myrna T. Williams, Chairman

Mr. Robert E. Price, Vice Chairman

Mr. Joseph E. Dini, Jr.

Mrs. Jan Evans

Mr. Val Z. Garner

Mr. David E. Humke

Mrs. Joan A. Lambert

Mr. William A. Petrak

Mr. Gene T. Porter

Mr. Robert M. Sader

Mr. Scott Scherer

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman Sandra J. Tiffany, District No. 21

Assemblyman Lou Toomin, District No. 15

Assemblyman Vivian L. Freeman, District No. 24

Assemblyman John Carpenter, District No. 33

STAFF MEMBERS PRESENT:

Mr. Robert Erickson/Research Director, Legislative Counsel

Bureau

Mr. John R. Crossley/Director, Legislative Counsel Bureau

OTHERS PRESENT:

Ms. Mamie Chinn Hechter/Deputy Administrator for the State

Housing Division Mr. Jon L. Sasser/Nevada Legal Services

Mr. Kirby Burgess/Clark County

Ms. Lisa Foster/City of Sparks

Assembly Committee on Elections and Procedures June 17, 1993 Page: 8

AJR 6: Proposes to amend Nevada constitution to require that petition for recall of public officer contain signatures of certain number of registered voters.

Ms. Nancy Howard, Nevada League of Cities, stated AJR 6 was a joint effort between Nevada League of Cities and Nevada Association of Counties to clarify the number of signatures needed for a recall petition to assure a sufficient number of signers. See (Exhibit F.) She had worked with Mr. Scherer on AJR 6 amended language which she briefly described.

Mrs. Williams stated she had received many calls regarding \underline{AJR} $\underline{6}$.

Mr. Scherer added <u>AJR 6</u> was connected with <u>AB 552</u> on recall. One of the requests was that committee specify what the general election was and the election at which the person was elected. If the committee was receptive to making it the election at which a representative or councilman or an elected official was elected, it would be prudent to pass <u>AJR 6</u> in the amended form to begin the process of amending the Constitution.

Mr. Petrak said a recall stated the people who voted for that person and who wanted to recall were the only ones who could sign a petition to have him recalled. Ms. Howard answered currently it was just the registered voters within the district who could sign a petition. They did not have to have voted for him. She added they were trying to go back to the election in which he was elected.

Mrs. Williams explained when the bill first came out, it read, "25 percent of the registered voters in the district," and what they intended was 25 percent of the number of registered voters who voted in that person's election whenever the election was held.

Discussion ensued between Mr. Scherer and Mr. Petrak with Mr. Scherer explaining if 4,000 people voted in the election, they would need 1,000 signatures, 25 percent of the people who actually voted. AJR 6 was originally worded to require 25 percent of registered voters.

Mr. Scherer further stated he believed <u>AJR 6</u> was a good change, and he was not wedded to any of the numbers. It was important to provide clarity so that people would know what they were required to do to initiate a recall, Mr. Scherer declared.

Assembly Committee on Elections and Procedures June 17, 1993 Page: 9

Mrs. Williams asked Mr. Scherer if it said <u>general election</u>, which meant November. She asked what application it would have to municipal elections and other special district elections. Mr. Scherer answered her question by explaining the amendment omitted "at the preceding general election" and replaced it with "at the election in which he was elected."

Mrs. Lambert revealed comments from the registrar in Washoe County when recalls were in process, that the 20 days from the time district court looked at the petition until the election had to be held was not sufficient time for large counties with large numbers of voters.

Ms. Michelle Bero, representing Nevada Association of Counties, informed she had talked with Ms. Marlene Henderson, Registrar of Voters, Washoe County, and with Mr. Scherer regarding the time frame which Nevada Association of Counties would like to see extended. An actual date had not been set, and she asked if Mr. Scherer could add language to extend the time frame.

Mr. Scherer said language was not in AJR 6, but the time frame in the constitution was 20 days, and the language should be included in AJR 6. He thought 30 days might be more reasonable with the growth of Clark and Washoe Counties, even within 45 days of the date the petition was filed and held in conjunction with the regular election so that the county could save some money by doing it all at once rather than holding a special election.

Mrs. Williams asked Mr. Scherer to obtain a properly drawn amendment to AJR 6.

Mrs. Williams closed the hearing on AJR 6.

ACR 71: Directs Legislative Commission to conduct interim study of drug and alcohol abuse among criminal offenders.

Mr. Bob Sader, Chairman of Committee on Judiciary and sponsor of ACR 71, explained ACR 71 was a result of testimony in the Judiciary Committee which was similar to testimony in recent past sessions. Mr. Sader discussed the purpose of ACR 71 which was to develop serious programs for both deferral of criminal defendants, treatment on probation of criminal defendants and treatment within the prison system of criminal defendants. He discussed statistics of the prison system which showed over 60 percent of defendants in the prison system in Nevada were either alcohol or drug abusers or both.

885 P.2d 583 Page 1

110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085 (Cite as: 110 Nev. 1295, 885 P.2d 583)

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Foley v. KennedyNev.,1994.

Supreme Court of Nevada.

Joseph FOLEY, Appellant,

v

James C. KENNEDY, Martha Pauline Kennedy, Ralf N. Rost, S. Patricia Rost, Tyrone C. Parker, Sally Parker, Laree Bates, and the Clark County Registrar of Voters, Deborah West, Respondents. Patrick C. CLARY, Fred E. Case, Hazel L. Case, Barbara Lynn Horn, Pamela R. Tarkanian, and Danny J. Tarkanian, Appellants/Cross-Respondents,

Carolyn M. SPARKS, Respondent/Cross-Appellant, and Clark County Registrar of Voters, Deborah West, Respondent/Cross-Respondent.

Nos. 24284, 24285.

Nov. 30, 1994. Rehearing Denied June 22, 1995.

Petition to recall university regent was found to be invalid due to deficient number of signatures, the Registrar of Voters was directed to take no further action on petition, but regent's request for costs was denied by the Eighth Judicial District Court, Clark County, William P. Beko, J. Cross-appeals were taken. The Supreme Court held that: (1) general election preceding filing of petition for recall was relevant election when determining number of signatures required by State Constitution; (2) equitable estoppel did not require state to accept a deficient recall petition; and (3) regent was entitled to award of costs.

Affirmed in part and reversed in part. West Headnotes

[1] Officers and Public Employees 283 70.7

283 Officers and Public Employees
283I Appointment, Qualification, and Tenure
283I(G) Resignation, Suspension, or Removal
283k70.7 k. Recall. Most Cited Cases
(Formerly 283k701/2)

General election preceding filing of petition for recall of public officers, rather than election preceding filing of notice of intent to recall, is used for determining number of signatures for recall petition required by State Constitution. Const. Art. 2, § 9; N.R.S. 306.020, subd. 2(b).

[2] Constitutional Law 92 20

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k11 General Rules of Construction
92k20 k. Subsequent Legislative or
Executive Construction. Most Cited Cases
Constitution may not be construed according to

[3] Constitutional Law 92 48(1)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(1) k. In General. Most Cited

Cases

Statutes must be construed consistent with Constitution and, where necessary, in manner supportive of their constitutionality.

[4] Estoppel 156 62.2(2)

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General 156k62 Estoppel Against Public, Government, or Public Officers

156k62.2 States and United States

156k62.2(2) k. Particular State Officers, Agencies or Proceedings. Most Cited Cases Equitable estoppel did not apply to require the Registrar's office or state to accept university regent recall petition and to go forward with recall election, despite contention that petitioners relied upon erroneous advice from Registrar's office concerning number of signatures required for valid recall petition; state cannot be estopped from cancelling illegal election and estoppel could not be applied to university regent who was blameless target of recall petition. Const. Art. 2, § 9.

[5] Costs 102 € 58

102 Costs

102I Nature, Grounds, and Extent of Right in

110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085

(Cite as: 110 Nev. 1295, 885 P.2d 583)

General

102k58 k. In Special Proceedings. Most Cited Cases

Hearing on sufficiency of petition to recall university regent was "special proceeding" under statute mandating award of costs to prevailing party. N.R.S. 18.020, subd. 4.

[6] Costs 102 € 32(2)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k32 Prevailing or Successful Party in General

102k32(2) k. Who Is Prevailing Party in General. Most Cited Cases

University regent who was target of recall petition was "prevailing party" under statute mandating award of costs when petition was declared invalid due to inadequate number of signatures required for valid recall petition. Const. Art. 2, § 9; N.R.S. 18.020, subds. 1-3, 5.

**583 *1296 Foley & Jones, Las Vegas, for Joseph Foley.

Rex Bell, Dist. Atty., and Mary-Anne Miller, Deputy Dist. Atty., Clark County, for Clark County Registrar of Voters

**584 Beckley, Singleton, DeLanoy, Jemison & List and Daniel F. Polsenberg, Las Vegas, for Carolyn M. Sparks.

Daniel J. Albregts, Las Vegas, for Kennedy, Rost, Parker, and Bates, and for appellants/cross-respondents.

OPINION

PER CURIAM:

This is an appeal from a judgment finding a petition filed by a citizens group seeking to recall a member of the Board of Regents legally insufficient and an order directing the Registrar of Voters *1297 to take no further action on the recall petition. There is also a cross appeal from an order of the district court denying the subject of the recall effort his request for costs.[FN]

FN1. The Sparks case has been consolidated with another appeal and cross appeal involving an attempted recall petition (the Foley case). The appeal in the Foley case was dismissed by this court on January 6,

1994. However, the Foley cross appeal remained pending in the transmuted form of an appeal. The only remaining issue in the Foley (cross) appeal had to do with Foley's request for costs; the same issue is present in the Sparks cross appeal. We therefore elected to address them together in this consolidated appeal.

FACTS

Appellants "The Citizens to Recall Carolyn M. Sparks" (hereinafter "the Citizens") organized a petition drive to recall respondent Carolyn M. Sparks ("Sparks") from her position as a University of Nevada Regent. The following events are relevant to the resolution of this appeal: (1) on November 2, 1992, the Citizens, pursuant to NRS 306.015, filed the notice of intent to circulate a petition to recall Sparks; (2) on November 3, 1992, a general election was held, at which time 90,881 registered voters cast ballots in the geographical area comprising University Regent Section 2, Subdistrict B (Sparks' district); and (3) on December 31, 1992, the Citizens submitted the recall petition to the Clark County Registrar of Voters, which, according to the district court's judgment, contained 12,887 valid signatures.

On January 22, 1993, the Clark County Registrar of Voters, represented by the Clark County District Attorney's Office, filed a petition for a hearing to determine the sufficiency of the recall petition. At the time, NRS 306.040 required the Registrar to automatically submit the matter to the district court for a sufficiency hearing. After an evidentiary hearing, the district court, having first announced its ruling in open court, filed its findings of fact, conclusions of law and judgment on February 19, 1993.

The lower court determined that the organizers of the recall drive had relied upon the erroneous advice of the assistant registrar of voters indicating that 10,301 signatures were essential for the presentation of a valid petition. This figure was based upon twenty-five percent of the vote for the specific office of Regent in the 1990 election. However, the district court determined that Article 2, section 9, of the Nevada Constitution provided that twenty-five percent of the votes cast in the relevant geographical area (the district that elected the officer) in the general election preceding the filing of the petition constituted the requisite number of signatures to be included in the recall petition. Utilizing the vote tallies from the November 3, 1992 election, the

110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085

(Cite as: 110 Nev. 1295, 885 P.2d 583)

district court found that under the constitutional formula, 22,720 signatures were necessary to a valid petition for Sparks' recall. *1298 Although other issues regarding the sufficiency of the recall petition had been raised,[FN2] the court ultimately ruled that based on the deficient number of signatures, the recall petition was legally insufficient. [FN3] Accordingly,**585 the court directed the Registrar of Voters to take no further action regarding the recall petition.

FN2. For example, at the conclusion of the hearings, the district court announced that the petition sufficiently provided a basis for verifying the identity and residence of each of the signatories to the petition. In addition, the Findings of Fact, Conclusions of Law and Judgment incorporated the determination that there was "substantial compliance with the laws of the State of Nevada notwithstanding petitioners' failure to consecutively number the pages of the petition."

FN3. The petition to recall Foley, initiated on the same date as the Sparks petition, was likewise found by Judge Beko to contain an insufficient number of signatures. Judge Beko also concluded that the Foley petition was legally insufficient due to other deficiencies as well and that it would have contained an inadequate number of signatures even if the earlier election results had been utilized.

Based upon the district court's ruling, Sparks sought to recover the legal costs incurred in her successful attempt to contest the sufficiency of the petition. Relying on NRS 18.020(4),[FN4] Sparks contended that the sufficiency hearing was a special proceeding and that she was entitled to an order requiring the losing party to pay her legal costs as the prevailing party. Appellants countered that such an order would, in effect, constitute a tax on the exercise of the constitutional right to recall elected officials and would have a chilling effect on future individuals legitimately seeking to improve their government. The court eventually granted appellants' motion to retax or strike Sparks' memorandum of costs.

FN4. NRS 18.020 provides in pertinent part:

Cases in which costs allowed prevailing party. Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered, in the following cases:

....

4. In a special proceeding.

The Citizens appeal on the legal questions of (1) whether the court applied the proper election in determining the number of required signatures and (2) whether they were reasonably entitled to rely upon the advice received by the Registrar as to the required number of signatures. Sparks filed a cross appeal from the district court's order granting the motion to retax or strike her memorandum of costs.

DISCUSSION

[1] The Citizens contend that the district court selected the wrong *1299 election as the determinant of the minimum number of signatures required for their recall petition. They insist that the proper election to be referenced was the general election preceding their filing of notice of intent to seek recall.

Article 2, section 9, of the Nevada Constitution provides, in pertinent part:

Sec. 9. Recall of public officers: Procedure and Every public officer in the State of limitations. Nevada is subject, as herein provided, to recall from office by the registered voters of the state, or of the county, district, or municipality, from which he was For this purpose a number of registered voters not less than twenty-five per cent (25%) of the number who actually voted in the state or in the county, district, or municipality electing said officer, at the preceding general election, shall file their petition, in the manner herein provided, demanding his recall by the people; they shall set forth in said petition, in not exceeding two hundred (200) words, the reasons why said recall is demanded.... If he shall not resign within five (5) days after the petition is filed, a special election shall be ordered to be held within twenty days (20) after the issuance of the call therefor, in the state, or county, district, or municipality electing said officer, to determine whether the people will recall said officer.

(Emphasis added.)

We conclude that the district court correctly found this language unambiguous as it says nothing 110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085

(Cite as: 110 Nev. 1295, 885 P.2d 583)

concerning the filing of the notice of intent to recall. According to the referenced constitutional provision, twenty-five percent of the persons who actually voted in the relevant political division in the preceding general election shall file their petition for recall. Thus, twenty-five percent of the persons who voted in the general election preceding the filing of the petition must sign the recall petition.

The procedure for initiating and carrying out a recall petition is further specified by Chapter 306 of the Nevada Revised Statutes, and it is upon this Chapter that the Citizens claim support for their position. NRS 306.015 provides for the filing of a notice of intent to circulate a recall petition. NRS 306.015(2) mandates that this notice:

- (a) Must be signed by three registered voters who actually voted in the state or in the county, district or municipality electing the officer at the last preceding general election.
- **586 (b) Must be signed before a person authorized by law to administer oaths that the statements and signatures contained in the notice are true....
- *1300 NRS 306.015(3) requires the petition to be submitted within sixty days of the filing of the notice.

NRS 306.015 does not require the notice to contain a statement of the number of signatures required to be on the petition; however, NRS 306.020(2)(b) specifies that the petition itself must contain a statement of the required number of signatures. The latter subsection of the statute provides:

- 2. The petition must, in addition to setting forth the reason why the recall is demanded:
- (b) Contain a statement of the minimum number of signatures necessary to the validity of the petition[.]

The Citizens allude to the impossible task of filing a notice less than 60 days prior to a general election and using the allotted 60 days to collect signatures (thus collecting signatures beyond the new election) in compliance with these statutes. They observe that no one can divine twenty-five percent of the persons "who actually voted" in a future election. Consequently, Citizens argue that it "must be" that the election preceding the filing of the notice is the relevant election for determining the required number of signatures.

[2][3] Citizens' reasoning is contrary to general rules of statutory and constitutional construction, placing, as it does, greater interpretive effect upon one section

of a statute than upon the plain terms of the constitution. The constitution may not be construed according to a statute enacted pursuant thereto; rather, statutes must be construed consistent with the constitution and, where necessary, in a manner supportive of their constitutionality. As this court has previously stated:

It should be noted at the outset that statutes should be construed, if reasonably possible, so as to be in harmony with the constitution. State of Nevada v. Glusman, 98 Nev. 412, 651 P.2d 639 (1982), appeal dismissed, 459 U.S. 1192[, 103 S.Ct. 1170, 75 L.Ed.2d 423] (1983); Milchem Inc. v. District Court, 84 Nev. 541, 445 P.2d 148 (1968). To this extent, an act is presumed to be constitutional and will be upheld unless the violation of constitutional principles is clearly apparent. Sheriff v. Martin, 99 Nev. 336, 662 P.2d 634 (1983); State of Nevada v. Ottenheimer v. Real Estate Glusman, above; Division, 97 Nev. 314, 629 P.2d 1203 (1981); County of Clark v. City of Las Vegas, 97 Nev. 260, 628 P.2d 1120 (1981).

Sheriff v. Luqman, 101 Nev. 149, 154, 697 P.2d 107, 111 (1985). By contrast, an adoption of the Citizens' position would *1301 require the untenable ruling that constitutional provisions are to be interpreted so as to be in harmony with the statutes enacted pursuant thereto; or that the constitution is presumed to be legal and will be upheld unless in conflict with the provisions of a statute. This is contrary to the clear rules of statutory and constitutional construction. [FN5]

FN5. Our ruling is consistent with an Attorney General's Opinion addressing the constitutional and statutory provisions at issue here. Specifically, an Opinion of the Attorney General explained that Article 2, Section 9, of the Nevada Constitution is "self-executing," and, therefore, "to the extent that NRS 306.020, subsection 1 would conflict with the provisions of the constitution, Article 2, Section 9 [of the constitution] should be followed and not the provisions of NRS 306.020, subsection 1." Op.Nev.Att'y Gen. No. 80-17 (May 21, 1980). Although the referenced opinion did not address the direct issue confronting us in the instant appeal, the Attorney General's Opinion also stated that "the term 'the preceding general election' refers to the general election immediately preceding the filing of a recall petition." Continuing, the

110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085

(Cite as: 110 Nev. 1295, 885 P.2d 583)

opinion concludes that "filing officers must determine if a recall petition contains a number of signatures equal to 25 percent of the number of voters who voted at the immediately preceding general election."

For the reasons specified, we affirm the district court's ruling and conclude that the plain and unambiguous language of the constitution is determinative of the issue of which election is relevant in calculating the required number of signatures on a recall petition: namely, the election immediately preceding the filing of the petition.

**587 Estoppel

[4] The Citizens also seek relief on grounds that they reasonably and detrimentally relied upon advice they received from the Registrar's office concerning the number of signatures required for a valid recall petition. Accordingly, Citizens argue that the principle of equitable estoppel applies to require the Registrar (or the state) to accept their recall petition and go forward with the recall election. We reject Citizens' argument.

We consider the following reasoning of the Arizona Supreme Court to be persuasive:

Elections are political matters to be decided by the electorate, but the legality of holding an election is a judicial question to be decided according to the requirements of the constitution. State v. Osborn, 14 Ariz. 185, 125 P. 884 (1912)....

Preliminarily ... we are met by the claims of several of the real parties in interest, who are candidates certified to appear on the recall ballot, that it is not necessary for the *1302 court to resolve the conflicting provisions of the state constitution applicable to this situation because the state is estopped from cancelling the election. The candidates contend that they, as well as many voters, justifiably relied to their detriment upon the Secretary of State's order calling the special election and the Attorney General's opinion stating that the election "shall be held even if the Governor later resigns or is removed from office prior to the election date." Ariz.Atty.Gen.Op. 188-015 (January 21, 1988)....

Ordinarily, a claim of equitable estoppel is made out when a person justifiably relies on the conduct of another to their detriment. Heltzel v. Mecham Pontiac, 152 Ariz. 58, 730 P.2d 235 (1986). Generally, however, the defense of estoppel does not apply against the state in matters affecting governmental or sovereign functions. Mohave

County v. Mohave-Kingman Estates, 120 Ariz. 417, 586 P.2d 978 (1978). Nor may the state be estopped by the unauthorized acts of its officers or employees. Freightways, Inc. v. Arizona Corporation Commission, 129 Ariz. 245, 248, 630 P.2d 541, 544 (1981)....

. . . .

[W]e point out that the state is not estopped from cancelling an illegal election. The provisions of the constitution control in such matters, and although the candidates may have relied in good faith upon the Attorney General's opinion, that opinion cannot negate the provisions of the constitution nor the authority of this court to interpret it.

Green v. Osborne, 157 Ariz. 363, 758 P.2d 138, 140-41 (1988) (emphasis added). Likewise, we reject the argument that equitable estoppel may apply to require the holding of an otherwise unconstitutional election.

Moreover, it has been held that "[e]stoppel is an equitable doctrine [] [which] will not be applied against one who is blameless." Ricciardi v. Los Angeles County, 115 Cal.App.2d 569, 252 P.2d 773, 779 (1953). This principle has been utilized to prevent the application of equitable estoppel against the target of a recall petition who had nothing to do with erroneous advice given the recall organizers by See Wilcox v. Enstad, 122 a state official. Cal.App.3d 641, 176 Cal.Rptr. 560, 568-69 (1981) (school trustee target of recall election could not be prevented under theory of equitable estoppel from seeking to compel county clerk to comply with law by recall petitioners' asserted reliance on clerk's earlier representations as to how law would operate). Similarly, we conclude that the Registrar's erroneous advice does not require the Registrar (or *1303 the state) to accept the Citizens' recall petition and go forward with the recall election.

Legal Costs

In its findings of fact, conclusions of law and judgment, the district court ruled as follows:

IT IS ... ORDERED that a hearing on a recall petition is not a "special proceeding" within the contemplation of NRS 18.020(4), and therefore, no costs are awarded to Mr. Foley or Ms. Sparks under this statute; and

IT IS FURTHER ORDERED that even if an award of costs was within this Court's **588 discretion, no costs would be awarded in this type of matter.

885 P.2d 583 Page 6

110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085

(Cite as: 110 Nev. 1295, 885 P.2d 583)

Cross-appellant Sparks contests the district court's denial of recovery of costs. She argues that the hearing on a recall petition is a "special proceeding" and consequently, that NRS 18.020(4) [FN6] mandates recovery of the prevailing party's costs. We agree.

FN6. NRS 18.020 provides:

Cases in which costs allowed prevailing party. Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered, in the following cases:

- 1. In an action for the recovery of real property or a possessory right thereto.
- 2. In an action to recover the possession of personal property, where the value of the property amounts to more than \$2,500. The value must be determined by the jury, court or master by whom the action is tried.
- 3. In an action for the recovery of money or damages, where the plaintiff seeks to recover more than \$2.500.
- 4. In a special proceeding.
- 5. In an action which involves the title or boundaries of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, including the costs accrued in the action if originally commenced in a justice's court.
- [5] NRS 18.020(1)-(3) and (5) $[^{FN7}]$ mandates an award of costs to the prevailing party in the "actions" specified therein, which are fairly all-encompassing, including actions concerning property and actions for money damages. NRS 18.020(4) provides for an award of costs to the prevailing party in any "special We have recognized this statute's proceeding." language mandatory dealing with "special See, e.g., Day v. West Coast proceedings." Holdings, Inc., 101 Nev. 260, 264, 699 P.2d 1067, 1070 (1985) (costs are mandatory to the prevailing party in an action falling *1304 under NRS 18.020). Since Sparks ultimately prevailed against Citizens in their effort to effectuate her recall, the issue concerning her entitlement to costs involves a determination as to whether the proceedings against her fall within the purview of a "special proceeding."

FN7. Id.

FN8. This court has determined that a pre-

probate will contest is a special proceeding. Gavin v. Rhoden, 97 Nev. 147, 625 P.2d 571 (1981) (citing Wainwright v. Bartlett, 51 Nev. 170, 271 P. 689 (1928), in which a will contest was held to be a special proceeding). However, this court did not elucidate the defining characteristics of a special proceeding in these opinions.

"It may be said generally that any proceeding in a court which was not under the common-law and equity practice, either an action at law or a suit in chancery, is a special proceeding." Schmaling v. Johnston, 54 Nev. 293, 301, 13 P.2d 1111, 1113 (1932) (quoting In re Central Irrigation Dist., 117 Cal. 382, 49 P. 354, 356 (1897)) aff'd on rehearing, 55 Nev. 164, 27 P.2d 1059 (1934). The following language from Avelar v. Superior Court, 7 Cal.App. 4th 1270, 9 Cal.Rptr.2d 536 (1992), albeit in a context other than costs, explains the term "special proceeding":

The difference between an action and a special proceeding, as defined by the statutes, is in the remedy sought. (See Agricultural Labor Relations Bd. v. Superior Court (1983) 149 Cal.App.3d 709, 714, 196 Cal.Rptr. 920.) A "special proceeding is confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity." (Tide Water Assoc. Oil Co. v. Superior Court (1955) 43 Cal.2d 815, 822, 279 P.2d 35 [emph. supp.].)....

....

.... By describing a "special proceeding" as any remedy not available in an "action," the Legislature must have meant to create and recognize two roughly equivalent levels of independent procedures to be directed towards the attainment of different, but similarly final remedies.

Id. 9 Cal.Rptr.2d at 539-40.

[6] The hearing at issue was held pursuant to the former version of NRS 306.040,[FN9] which required the Registrar, upon the filing of a recall petition, to automatically submit the petition to the district court for a public hearing on the petition's sufficiency. Nevertheless, Sparks and the organizers of the recall petition were deemed *1305 the real parties **589 in interest in the Registrar's filing, and both parties hired attorneys to represent their divergent interests at the hearing. Because the mechanism (judicial hearing) for determining a recall petition's sufficiency is strictly a creature of statute, underived from the panoply of remedies traditionally available in actions at law or suits in equity where one party has sued the

110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085

(Cite as: 110 Nev. 1295, 885 P.2d 583)

other, we conclude that the proceeding was a special proceeding. Since Sparks prevailed in the proceedings below, we hold that Sparks is entitled to her mandatory award of costs under NRS 18.020(4). (Foley is entitled to his costs under the same reasoning.) We thus reverse the lower court's ruling as it relates to costs.

FN9. The statute has since been amended to require a hearing on the sufficiency of the petition only when it is challenged by the filing of a complaint. *See* 1993 Nev.Stat., ch. 576 § 7 at 2408-09.

In ruling as we have, we are not unmindful of the competing constitutional interests affected by this decision, i.e., the property interest held by the challenged elected official in the office to which he or she has been elected, and the right of individuals to legitimately seek recall of officials who are viewed as having failed in their public trust. See Crowe v. Lucas, 595 F.2d 985, 993 (5th Cir.1979); Brown v. Perkins, 706 F.Supp. 633, 634 (N.D.Ill.1989). Under today's ruling, it is apparent that accessing and asserting the referenced constitutional rights will ultimately redound to the financial detriment of the losing party.

Despite our ruling, and in view of the potential problems and consequences that may result therefrom, we strongly invite the Legislature to address these issues. The legislative laboratory is well-suited to entertain the study, debate and public input necessary for a wise and fair resolution of the various ramifications and results of this decision. Of primary concern is the chilling effect the statutes, as interpreted here, may have on citizens legitimately trying to exercise their constitutional rights. Specifically, well-meaning citizens who fail in their attempt to exercise their constitutional right to recall an elected official are subject to an award of costs. Of perhaps equal concern is the chilling effect spurious recall efforts could have on the willingness of public officials to subject themselves to substantial cost awards in the event the recall effort is successful. In the latter case, public officials unendowed with an abundance of personal financial resources, could simply find the alternative of resignation more palatable than the prospect of a costly and perhaps unavailing defense. This alternative could have special attraction to a public official subjected to irresponsible, concentrated media efforts to promote the recall.

CONCLUSION

For the reasons discussed above, we affirm the district court's ruling that the general election immediately preceding the filing of the petition is relevant for determining the required number of *1306 signatures on a recall petition. In addition, we reverse the district court's ruling as to costs on the grounds that the statutorily mandated judicial hearing is a special proceeding which requires an award of costs to the prevailing party. Accordingly, both Sparks and Foley are entitled to their costs, and these matters are remanded to the district court for the limited purpose of determining the amount of the cost award to Sparks and Foley, respectively, and the entry of judgment thereon.

Nev.,1994. Foley v. Kennedy 110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085

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Sec. 9. Recall of public officers: Procedure and limitations. Every public officer in the State of Nevada is subject, as herein provided, to recall from office by the registered voters of the state, or of the county, district, or municipality which he represents. For this purpose, not less than twenty-five percent (25%) of the number who actually voted in the state or in the county, district, or municipality which he represents, at the election in which he was elected, shall file their petition, in the manner herein provided, demanding his recall by the people. They shall set forth in said petition, in not exceeding two hundred (200) words, the reasons why said recall is demanded. If he shall offer his resignation, it shall be accepted and take effect on the day it is offered, and the vacancy thereby caused shall be filled in the manner provided by law. If he shall not resign within five (5) days after the petition is filed, a special election shall be ordered to be held within thirty (30) days after the issuance of the call therefor, in the state, or county, district, or municipality electing said officer, to determine whether the people will recall said officer. On the ballot at said election shall be printed verbatim as set forth in the recall petition. the reasons for demanding the recall of said officer, and in not more than two hundred (200) words, the officer's justification of his course in office. He shall continue to perform the duties of his office until the result of said election shall be finally declared. Other candidates for the office may be nominated to be voted for at said special election. The candidate who shall receive highest number of votes at said special election shall be deemed elected for the remainder of the term, whether it be the person against whom the recall petition was filed, or another. The recall petition shall be filed with the officer with whom the petition for nomination to such office shall be filed, and the same officer shall order the special election when it is required. No such petition shall be circulated or filed against any officer until he has actually held his office six (6) months, save and except that it may be filed against a senator or assemblyman in the legislature at any time after ten (10) days from the beginning of the first session after his election. After one such petition and special election, no further recall petition shall be filed against the same officer during the term for which he was elected, unless such further petitioners shall pay into the public treasury from which the expenses of said special election have been paid, the whole amount paid out of said public treasury as expenses for the preceding special election. Such additional legislation as may aid the operation of this section shall be provided by law.

[Added in 1912, amended in 1970 and 1996. The addition was proposed and passed by the 1909 legislature; agreed to and passed by the 1911 legislature; and approved and ratified by the people at the 1912 general election. See: Statutes of Nevada 1909, p. 345; Statutes of Nevada 1911, p. 448. The first amendment was proposed and passed by the 1967 legislature; agreed to and passed by the 1969 legislature; and approved and ratified by the people at the 1970 general election. See: Statutes of Nevada 1967, p. 1782; Statutes of Nevada 1969, p. 1663. The second amendment was proposed and passed by the 1993 legislature; agreed to and passed by the 1995 legislature; and approved and ratified by the people at the 1996 general election. See: Statutes of Nevada 1993, p. 3135; Statutes of Nevada 1995, p. 2887.]